

(1989) 03 KAR CK 0007
In the Karnataka High Court
Case No : C.R.P. No. 5410 of 1988

M/s. Anand Enterprises, Bangalore and others

APPELLANT

Vs

Syndicate Bank, Bangalore

RESPONDENT

Date of Decision : 03-03-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6A, 115

Mysore Court-fees and Suits Valuation Act, 1958 — Section 8, 9

Citation : AIR 1990 Kar 175 : (1990) ILR (Kar) 745 : (1989) 2 KarLJ 117

Hon'ble Judges : P.K. Shyamsundar, J

Bench : Single Bench

Advocate : V. Krishnamurthy and H.N. Narayana, for the Appellant; B.R. Aswatharam and A.J. Gunjal Govt. Pleader, for the Respondent

Judgement

1. This civil revision petition laid to this Court under S. 115, C.P.C. arises from and is directed against an order made by the Court-below on issues 5 and 6 in a pending suit being O.S. 557/82.

2. The petitioners herein are the defendants in the court-below and the sole respondent is the plaintiff. The parties are referred to as plaintiff and defendant in the course of this order.

3. The plaintiff filed a suit against the defendants amongst whom the first defendant was a firm of which defendants 2 to 5 were partners, for recovery of a sum of Rs. 32 lakhs and odd stated to be due under a term loan obtained by the defendants from the plaintiff on the security of certain properties.

4. In the course of the written statement filed on behalf of the defendants it was sought to be contended that because there was some delay on the part of the plaintiff in advancing the loan defendants who in anticipation of the said loan made certain arrangements had to suffer losses on account of the delay in the receipt of the loan amount and, therefore, it was urged the plaintiff was liable to them in damages which was tentatively quantified at Rs. 4 laths. This sum the

defendant claimed to set-off from the aggregate of the suit claim made against them. The plea in the written statement raising the aforesaid claim of set-off is found in para 7 of the written statement. It reads :

"These defendants further plead that they are put to loss by the delay in making the various payments under the agreements by the plaintiff-bank. In consequence, they have suffered damages. The plaintiff is bound to pay the defendants towards the same. The amount of damages so suffered by these defendants is therefore liable to be equitably set-off against any amount determined to be payable by the defendant to the plaintiff."

5. On the filing of the written statement as aforesaid the plaintiff having again joined-in by urging that on the sum of Rs. 4 lakhs claimed as set-off being actually in the nature of a counter claim, requisite court-fee had to be paid and that there should be an order accordingly. The Court framed two issues in that behalf at issues 5 and 6 as follows :

"5) Is the claim of damages of defendants a set off, or a counter claim?

6) Are defendants entitled to get a deduction of the said damages without payment of court-fee?"

Having framed the issues as above, the Court proceeded to decide them before disposing off the suit on its merits.

6. Learned Judge in the court below after hearing both sides held that the claim by the defendant was in the nature of a counter claim and the defendants were, therefore, liable to pay court-fee thereon before asking the Court to deduct the same from the suit claim. On the finding of the learned Judge as aforesaid the defendants being saddled with liability to pay as large a sum of Rs. 40,000/- by way of court-fee seek to challenge that order as legally unsustainable.

7. Sri. Krishnamurthy, learned Senior Counsel who appeared in support of this petition alongside Sri H. N. Narayan, raised on behalf of the petitioner only one contention namely that the sum claimed by the defendant in the written statement would not attract any court-fee because it had not yet partaken the character of an ascertained sum legally recoverable as enjoined by O.8, R. 6, C.P.C. Relying on the definition clause in the Court-Fees Act (hereinafter referred to as "the Act") as per S. 3(4) which enumerated, amongst other things, that expressions used but not defined in the Act or in the Karnataka General Clauses Act, 1899 but defined in the CPC shall have the meaning assigned to them in the said Code, Mr. Krishnamurthy pointed out that a. set-off that can be taxed under the Act is only the kind of set-off envisaged under O. 8, R. 6 of the CPC identified as legal set-off.

8. Order 8, R. 2 reads as follows :

"(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable

by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, or any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off."

The scheme of the Code reflected by the provision referred to supra would disclose that the defendant in a suit for recovery of money can in turn seek to fend that claim by setting-off against the plaintiff's demand any sum of money which is legally recoverable by him from the plaintiff but within the pecuniary jurisdiction of the Court in which the suit pends and thereupon the Court will adjudicate that claim treating the defendant as plaintiff for the the purpose of ascertaining the cross-claim made by him, in which event the written statement in such a suit will bear the characteristic of a plaint in a cross suit.

9. In this connection Ss. 11 and 14 of the Act may be read S. 11(1) stipulates in every suit instituted before any Court, the Court shall decide the correctness of the court-fee paid on the plaint before registering the plaint and all questions relating to court-fee shall be decided before evidence is recorded. S. 14 postulates payment of court-fee on a written statement filed by a defendant and inter alia enacts that the scheme of S. 11 applies mutatis mutandis to a written statement which is liable to be taxed. The Court below felt bound to record a finding on these issues connected with payment of court-fees posing them for consideration at the threshold itself and that procedure is admittedly without any blemish.

10. The question now is, whether the claim by the defendants made as it appears, principally for lightening the burden apropos the suit claim, was it a counter claim as held by the Court or was it only a cross-claim yet to fructify into an ascertained sum legally claimable by the defendant. As pointed out earlier the court below has treated the plea for recovery of money by the defendant to be a counterclaim as enjoined under O. 8, R. 6A of the Code of Civil Procedure. The Court also held that even otherwise the plea in the written statement if treated as set-off was liable to be taxed under the Court-fees Act since under law there was no difference between legal or an equitable set off. The views of the learned Judge in this behalf are set out in the following paragraphs :

"A written statement pleading a set off or a counter claim, shall be chargeable with fee, in the same manner as a plaint. So, in the Karnataka Court Fees Act,

what is liable to be charged is a set off, or a counter claim, claimed in the written statement. So, it does not draw any distinction between a legal set off or an equitable set off. A set off includes legal set off, and equitable set off. When it is not stated in S. 8 of the Court-fees Act, that equitable set off is not chargeable with court-fee, we have to construe that equitable set off is also liable for payment of court-fee, under S. 9 of the Court-fees Act, as in the case of a legal set off.

12. So, I am of the clear opinion that, defendants in this suit, are not entitled to get deduction of the said damages, without payment of court-fee. In view of the clear admission in para 7 of the written statement to the effect that, defendants have tentatively estimated their damages at Rs. 4 lakhs and on ascertaining the exact amount, they undertake to pay court-fee on it, defendant's advocate really had no scope to argue against his clients' said admission. When that admission of defendants was brought to the notice of defendants' advocate at the time of the arguments, still he submitted that in spite of said admission he is submitting his arguments and it may be considered. Therefore, in spite of said admission in the written statement, we have considered the submission of defendants' advocate and have negated it, for the reasons stated above."

11. A perusal of the foregoing view of the learned Judge makes it clear that according to him there was no distinction between legal and equitable set-off and irrespective of the nature thereof, the set-off claimed herein was liable for payment of court-fee. He also adverts to the plea in the written statement accepting liability to pay court-fee after the Court had ascertained the amount due to the defendant by way of damages. For the learned Judge, if not anything else, admission of liability to pay court-fee was clearly telling and had really concluded this controversy against the defendant, although he does not entirely rest his finding regarding defendant's liability to pay court-fee on the said admission alone. I shall revert a little later for an examination of the correctness and tenability of the learned Judge's view supra but will now proceed to ascertain whether the claim put forward by the defendant as to its nature viz., is it a counter-claim as held by the court or a set-off as urged by the defendant.

12. On more than one occasion Mr. Krishnamurthy made it clear that he did not want any decree in this suit for the money claimed by defendants in their written statement as damages. The claim by the defendant for money was not dehors the suit claim and was not set up or advanced herein as a cross-claim that can survive per se the suit claim. If the suit came to be dismissed for any reason, the defendants' cross-claim would not result in a decree for the simple reason, the defendants' endeavour herein being not to foist an independent claim against the plaintiff for collecting any money and all that they were doing was to set up or put forward a claim of their own arising from the suit transaction in mitigation of defendants' liability towards the suit claim. In other words, according to counsel this is not a case where the defendant was seeking to enrich himself on the plaintiff's account but was only seeking to diminish relatively the degree of

his burden under the suit claim.

13. The difference between a set off and a counterclaim has been succinctly brought out in the classic treatise "Halsbury's Laws of England" 4th edition, volume 62, at paras 406, 407 and 409. Para 406 refers to the meaning of set off and states :

"Where A has a claim for a sum of money against B and B has cross-claim for a sum of money against A such that B is, to the extent of his cross-claim, entitled to be absolved from payment of A's claim, and to plead his cross-claim as a defence to an action by A for the enforcement of his claim, then B is said to have a right of set-off against A to the extent of his cross-claim."

"Counterclaim" is defined in para 407 as follows :

"When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim."

409 deals with the distinction between set-off and counterclaim, as follows :

"Set-off is distinguishable from counterclaim both in its application and in its effect. In its application set-off is limited to money claims, whereas counterclaim is not so limited. Any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff's claim. Thus not only claims for money, but also other claims such as a claim for an injunction or for specific performance or for a declaration may be subject of a counterclaim.

In its effect set-off is essentially different from counterclaim in that set-off is a ground of defence, a shield and not a sword, which, if established affords an answer to the plaintiff's claim wholly or pro tanto, whereas counterclaim as such affords no defence to the plaintiff's claim, but is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action.""

14. These statements make it clear that a set-off is a defence put forward seeking Absolve from payment of the claim made, whereas counterclaim is a separate and independent action for recovery of money from the other person and such a counter-claim need not be limited to monetary claims only. Therefore set-off is essentially different from a counterclaim, in that it serves only as a ground of defence being a mere shield and not a sword which if established would account either for a dismissal of the plaintiff's claim in toto or would diminish it, whereas a counter-claim without being any defence for the suit claim nonetheless enables the defendant to effectively enforce a claim against the plaintiff in the very suit as if it was an independent action by the defendant.

15. Judged from these norms it becomes evident that the claim for damages by the defendant was not being brandished presently as a sword for recovering money from plaintiff but was merely being held up by the defendant as a shield to block the suit claim so as to ward off the severity of its blow. Added to this circumstances that the defendant had nowhere in the written statement sought for a decree for money which is the main characteristic of a set-off as distinct from a counterclaim and the plea in the written statement making it clear that defendants only wanted to set-off the amount to be awarded as damages against the suit claim they were resisting on other grounds as well, should leave no doubt at all that the claim herein was only a set-off and not a counterclaim. Therefore it is, while reaffirming the statement as above, I must record a finding that the learned Judge in the court below fell into a grave error in holding that the plea in the written statement by the defendants as aforesaid amounted to a counterclaim and did not remain a mere set-off.

16. The further question that arises now is whether as a set-off it is liable to be taxed in presenting. Much has been made by the Court below and in this Court by counsel for the plaintiff and the learned Government Pleader appearing for the State, on the undertaking by the defendants accepting liability to pay court-fee on the sum claimed by way of damages in the event of such damages being ascertained. Reference in this connection may be made to the plea in the written statement at para 7A wherein the defendant has said :

"On the 3rd occasion in January, 1979 sanction was accorded for a total loan of Rs. 20 lakhs including Rs. 13.35 lakhs. Rs. 6.65 lakhs was payable by plaintiff to defendant but only 5 lakhs were given and Rs. 1.05 lakhs were not advanced deposit obligation to do so. Being a statutory body and knowing of promising loan to be applied for commercial purposes the omission to do so entails payment of damages to the defendants estimate tentatively at Rs. 4/- lakhs, on ascertaining court-fee payable on the amount to be decreed."

Basing themselves mainly on the foregoing, it is submitted that in any view of the matter the defendants could not have avoided payment of court-fee here and now itself. Sri Krishnamurthy, learned Sr. Counsel appearing for the defendant does not deny liability to pay court-fee but points out that only after ascertainment by the Court of the sum due to the defendants as damages, they are liable to and can be called upon to pay court-fee. Counsel says that his clients are not liable to and no demand can be made on them to pay the court-fee on a tentative evaluation or estimate made by the defendants of their claim for damages.

17. I must agree that we cannot fix any liability on the defendants to pay court-fee on the sum of 4 lakhs claimed as damages since it is merely an estimate of a targeted figure claimed as damages and, there is therefore little reason to pin down to that statement to ring out money by way of court-fee. On that score, I do not find myself detained but it, however, becomes necessary now to consider the serious objection taken for the demand to pay court-fee immediately, on the

ground that court-fee is payable only on ascertaining the sum found to be legally due as envisaged by O.8, R. 6 of the CPC and that the Court-fees Act had not defined the word "set-off" at all but having elected to take support from the definition found in the Civil Procedure Code, no court-fee was due until the written statement can be treated as a legal set-off under O.8, R. 6, C.P.C. It is on the strength of this argument Sri Krishnamurthy, learned Sr. Counsel maintains that court-fee becomes due and is payable under the Act only on the set-off adverted to under O.8, R. 6 of the Code of Civil Procedure, and not on any other kind of set-off. Reliance in this connection is placed on the statement in Mallas C.P.C., 14th edition, page 1080, para 12 to the following effect :

"A written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off, and must be stamped accordingly. But court-fee is not payable on an equitable set-off, unless it is the subject-matter of a counter claim."

18. Sri. Gunjal, learned Government Pleader urges that there being no difference between a legal and equitable set-off court-fee is liable to be paid even on an equitable set-off. In this connection he relied on a number of decisions which do have taken the view that there is no distinction between legal set-off and an equitable set-off and even if it did exist it matters little in regard to payment of court-fee. But, it seems unnecessary to go into this aspect of the matter and to decide whether irrespective of the nature of the set-off in that whether it is legal or equitable, court-fee is liable to be paid or not. It seems sufficient for the present purpose to rely principally on the provisions of S. 3(4) of the Act and to the concomitant consequence of imparting to expressions occurring under the Act such meaning as ascribed by the Civil Procedure Code. Question principally for consideration herein is of court-fee to be computed and paid under the Act. In that situation if the Act itself reaches out to the CPC for resolution of any controversy touching an expression not defined by the Act it then becomes the duty of the Court to ascertain the meaning of that expression from the C.P.C.

19. It is common ground that set-off claimed by the defendant is liable for court-fee only when the written statement claiming set-off is liable to be treated as a plaint. There is little gain-say in denying that only a plaint is liable to be taxed towards court-fee and unless and until a written statement can be treated as a plaint, no court-fee is claimable or payable. In this case if what is claimed as a set off can be treated as a sum ascertained as legally recoverable, only then the plea for recovery of such a claim merits being treated as a plea couched in a plaint liable for rendition under the law. It seems to me that without more, liability of the defendant to pay court-fee on the claim of set-off must be postponed to a further stage and must pend till the Court adjudicates upon it and holds that any particular sum is legally recoverable by the defendant thereby ascertaining reciprocally the plaintiffs liability in that behalf. Unless that stage is reached it would be premature to make a demand for payment of court-fee by the defendant on the basis of a tentative claim made for recovering damages. It

may also be remembered that the claim by defendant is not for recovering any liquidated damages. It is an indefinite quantum. The figure of 4 lakhs referred to by him is merely a contingent expectancy and nothing more. What, therefore, follows is, the sum sought to be set-off was clearly of an unknown quantity not ascertained under any solemn agreement or something due under the law. At this juncture it may even look to be a wistful claim and may in the end turn out to be a windfall for which the defendant was looking out in vain. Surely court-fee cannot be claimed on such a basis both so nebulous and tenuous.

20. I am not impressed by the argument of Sri. Aswatharam for the plaintiff that postponement of payment of court-fee being only limited to suits of a particular category like suits for accounts etc. the same was not attracted herein. But, what the argument overlooks is that for court-fee to be paid on the written-statement it must first become a plaint and until it becomes a plaint no court-fee is liable to be paid. Herein the written statement seeking a set off will not become a plaint until the sum sought to be set off is ascertained by the Court to be legally recoverable by the defendant. Therefore, the fact that the Court-fees Act enjoins immediacy in the matter of payment of court-fee has little bearing on the question arising for consideration herein.

21. I may in this connection refer to a decision of the Kerala High Court in *Sankara Pillai Vs. Parameswaran Pillai*, . Therein a learned single Judge of that Court has taken a view similar to the one taken by me herein. That was a case in which some money due under a promissory note was sought to be recovered in the suit filed. In the defence a claim for set-off of Rs. 204/- was put forward, the basis pleaded being the said sum was liable to be appropriated by the defendant towards his fees for conducting some suits on behalf of the plaintiff. What is more an agreement for setting-off of the said sum towards defendant's liability under the suit pronote was put forward and acting upon the same the defendant actually tendered the balance of the suit claim due after setting-off of what was due to him. The defendant actually paid court-fee on the sum of Rs. 204/- claimed by way of set-off. But the plaintiff having demurred against the plea of set-off, the court-below held that the defendant was not entitled to claim a set-off in the suit. This finding was treated as finding on a preliminary issue and a revision petition having been filed before the High Court by the defendant, a learned single Judge of that Court after referring to a few decisions and a statement in Chitaley's C.P.C. 6th edition, page 2397 held :

"Every claim for a specified sum by way of set-off is not necessarily for an "ascertained sum of money legally due within the meaning of O. 8, R. 6, C.P.C. It may, for example, be a sum not admitted by the other side and not decreed by Court. But it must in any event be a cross-claim for a liquidated amount, that is debts due for liquidated sums or demands which can be ascertained with certainty at the time of the pleading and not what may ultimately be ascertained by the Court at the time of passing of the decree. So while the fact that an arithmetical calculation is necessary to arrive at the total sum may not matter,

the fact that the amount can be ascertained only after a controversial process, will turn the scale in the application of the definition."

With respect I agree with the statement of the law as made above by Vardaraja Iyengar, J. The resulting position therefore is that until the sum claimed as due to the defendant is ascertained and made legally recoverable any claim towards the same does not tantamount to a legal set-off and unless the claim partakes the character of a legal set-off no court-fee is payable under the Act. Accordingly I hold that by the mere fact of pleading set-off in a sum of Rs. 4 lakhs defendant does not become liable to pay court-fee instantaneously. Their liability will arise only after the Court ascertains the sum due to him in the context of the claim made by him and only thereafter has to be called upon to pay court-fee and of course if they do not pay the court-fee demanded, then they will not get the benefit of the said claim. In this view of the matter it becomes clear that presently the defendant could not be saddled with liability to pay court-fee and hence the direction made by the court below to pay court-fee on the sum of Rs. 4 lakhs claimed as damages is clearly untenable and without jurisdiction. "If court-fee is demanded when nothing is due and no liability towards court-fee arises on admitted facts, imposing of court-fee in those circumstances would be to act with material irregularity, if not acting without jurisdiction. Hence, the order of the court below is liable for interference under S. 115 of the C.P.C. I am highlighting this aspect of the matter to point out the non-tenability of the argument advanced by Sri. Aswatharam that the order of the court-below made by disposing off issues 5 and 6 resulting in the imposition of liability to pay court-fee on the defendant, could not be interested with in the exercise of the judicial jurisdiction of this Court.

22. For the reasons aforesaid, this revision petition succeeds and is allowed. The order of the court-below made on issues 5 and 6 in O.S. 557/82 on the file of the Addl. City Judge, Bangalore is hereby set aside. The defendants are held liable to pay court-fee only after the Court ascertains the sum recoverable by the defendant from the plaintiff as damages, and only that sum is entitled to be set-off towards the suit claim but on payment of requisite court-fee. Until then no court-fee is liable to be paid by defendants on their written statement. No costs.

23. Revision allowed.